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For intersex human rights, information, and peer support

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Submission on reform of anti-discrimination law in Northern Territory

1. Introduction

This submission has been written and submitted to the Northern Territory Department of the Attorney-General and Justice by **Organisation Intersex International Australia Limited** ("OII Australia"), a national organisation run by and for people born with intersex variations. OII Australia welcomes proposals to modernise anti-discrimination law in the Northern Territory.

OII Australia promotes the human rights and bodily autonomy of intersex people in Australia, and provides information, education and peer support. OII Australia is a not-for-profit company, with Public Benevolent Institution (charitable) status.

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2. Recommendation

We recommend that the Northern Territory government introduce protections on grounds of "sex characteristics" rather than "intersex status", in line with a consensus statement by the Australian and Aotearoa/New Zealand intersex community, and the 2017 update to the Yogyakarta Principles on the application of international human rights law to sexual orientation, gender identity, gender expression and sex characteristics. A recommended definition of "sex characteristics" is provided by the Yogyakarta Principles update:

each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty¹

¹ Yogyakarta Principles. The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics, to Complement the Yogyakarta Principles. 2017 [cited 2017 Nov 27]. Available from: <http://www.yogyakartaprinciples.org/principles-en/yp10/>

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4. Intersex

OII Australia refers to intersex people in this document in line with the definition used by the UN Office of the High Commissioner for Human Rights:

Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.²

We use this term to include all people born with bodies that do not fit medical or social norms for male or female bodies. In doing so, we acknowledge the diversity of intersex people in terms of our identities, legal sexes assigned at birth, our genders, gender identities, and the words we use to describe our bodies.

Many forms of intersex exist; it is a spectrum or umbrella term, rather than a single category. At least 30 or 40 different variations are known to science;³ most are genetically determined. Since 2006, clinicians frequently use a stigmatising label, “Disorders of Sex Development” or “DSD”, to refer to intersex variations.

² Office of the High Commissioner for Human Rights, African Commission on Human and Peoples’ Rights, Council of Europe, Office of the Commissioner for Human Rights, Inter-American Commission on Human Rights, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, et al. Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge [Internet]. Office of the High Commissioner for Human Rights; 2016 [cited 2016 Oct 24]. Available from:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>

³ Hiort O. I-03 DSDnet: Formation of an open world-wide network on DSD at clinician conference, “4th I-DSD Symposium”; 2013: “DSD comprise a heterogeneous group of differences of sex development with at least 40 different entities of which most are genetically determined. An exact diagnosis is lacking in 10 to 80% of the cases”, [cited 1 Jul 2013]. Available from

http://www.gla.ac.uk/media/media_279274_en.pdf

Intersex variations can include differences in the number of sex chromosomes, different tissue responses to sex hormones, or a different hormone balance. Examples of intersex variations include androgen insensitivity syndrome (AIS), congenital adrenal hyperplasia (CAH), and sex chromosome differences such as 47,XXY (often diagnosed as Klinefelter syndrome) and 45,X0 (often diagnosed as Turner syndrome). Many persons do not have clear genetic diagnoses.³ Some common intersex variations are diagnosed prenatally.⁴

5. Intersex people and discrimination

We welcome recognition that intersex people need protection from discrimination. Intersex people suffer many distinctive forms of discrimination and violence due to our sex characteristics. The Office of the High Commissioner for Human Rights states:

Because their bodies are seen as different, intersex children and adults are often stigmatized and subjected to multiple human rights violations, including violations of their rights to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination.

Intersex persons are often subjected to discrimination and abuse if it becomes known that they are intersex, or if they are perceived not to conform to gender norms. Anti-discrimination laws do not typically ban discrimination against intersex persons, leaving them vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports.⁵

A 2015 Australian survey of 272 people born with atypical sex characteristics found many individual and systemic examples of discrimination:⁶

- The researcher found “strong evidence suggesting a pattern of institutionalised shaming and coercive treatment”.
- 60% had thought about suicide, while 19% had attempted it.
- 41% of the survey population earned less than \$20,000 per year, and 63% earned under \$41,000 per year.
- 19% of people born with atypical sex characteristics failed to complete secondary school, due to reasons including the impact of medical interventions during puberty, stigmatisation and bullying on grounds of sex characteristics, and unaddressed issues associated with developmental delays.⁷

⁴ Davis G. The Social Costs of Preempting Intersex Traits. *The American Journal of Bioethics*. 2013;13(10):51–3.

⁵ United Nations, Office of the High Commissioner for Human Rights. Free & Equal Campaign Fact Sheet: Intersex [Internet]. 2015 [cited 2015 Sep 5]. Available from: https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf

⁶ See more information at Organisation Intersex International Australia. Demographics [Internet]. 2016 [cited 2016 Aug 9]. Available from: <https://oii.org.au/demographics/>

⁷ Jones T. The needs of students with intersex variations. *Sex Education*. 2016;16(6):602–18.

Further information on the forms of discrimination experienced by intersex people can be found in:

- a 2016 statement by the UN Office of the High Commissioner for Human Rights.⁸
- a manual on sexual orientation, gender identity and sex characteristics produced by the Asia Pacific Forum of National Human Rights Institutions.⁹
- A Shadow Report submission by OII Australia to the UN Human Rights Committee in August 2017.¹⁰

6. Discussion Paper Question 3

The information presented to contextualise Question 3 unfortunately conflates legal sex classifications with physical sex characteristics in ways that do not reflect the diversity of intersex people, our legal sex classifications, gender identities or lived experiences.

In relation to legal sex classifications, a 2015 study of 272 people born with atypical sex characteristics found that intersex people have a variety of legal sex assignments, and gender identities; many have identities that coincide with legal sex assignment at birth, and others have identities that differ from that assignment.

⁸ Office of the High Commissioner for Human Rights, African Commission on Human and Peoples' Rights, Council of Europe, Office of the Commissioner for Human Rights, Inter-American Commission on Human Rights, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, et al. Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge [Internet]. Office of the High Commissioner for Human Rights; 2016 [cited 2016 Oct 24]. Available from:

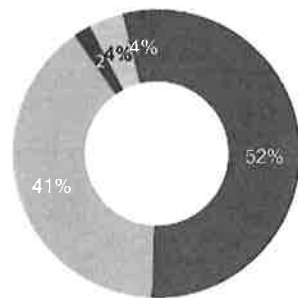
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>

⁹ Asia Pacific Forum of National Human Rights Institutions. Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics [Internet]. Sydney, Australia: Asia Pacific Forum of National Human Rights Institutions; 2016 [cited 2016 Jun 16]. Available from: <http://www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/>

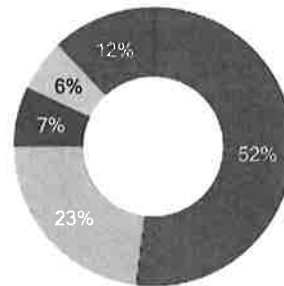
¹⁰ Carpenter M, Organisation Intersex International Australia. Shadow Report submission to the Human Rights Committee on the situation of intersex people in Australia [Internet]. 2017 Aug [cited 2017 Aug 29]. Report No.: INT/CCPR/CSS/AUS/28771. Available from: <https://oii.org.au/31568/shadow-report-iccpr-2017/>

Sex assignments and gender identities

Reported sex at birth



Sex now



■ F
■ M
■ X
■ Unsure
■ Other option

Complexities of asking about birth assignment:

“I was christened male, but reassigned female at day 5, and then realigned back to my male self at age 29.”

Note: multiple choices possible

Australia has had increasingly accessible third sex/gender classifications since 2002, and close to 20% of respondents born with atypical sex characteristics use them (as do a proportion of non-intersex people).

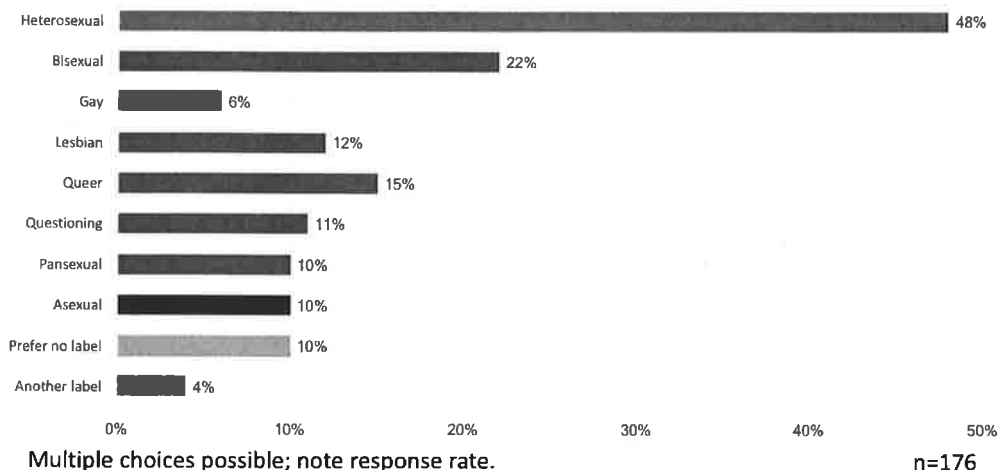
Assumptions that intersex people should be a third sex fail to take account of the many different ages where discovery of an intersex trait occurs. For example, should the already-assigned sex of an adolescent be removed from them if a chromosomal variation is discovered? Should women athletes, born and raised as women but found to have an intersex trait, be regarded as no longer women, and reassigned? The costs of disclosure itself, and of excluding women with intersex traits from sport, are known to include humiliation, suicide attempts, and the loss of career, family, housing and self-esteem.¹¹ These can also occur with other situations involving late (and not so late) discovery.

All non-binary people deserve protection from discrimination on grounds of their gender identity, whether they were born with an intersex variation or not. However, it is recommended to ensure that intersex is not conflated with non-binary gender.

People born with atypical sex characteristics also show diversity in our sexual orientations:

¹¹ Martínez-Patiño MJ. Personal Account A woman tried and tested. *The Lancet*. 2005 Dec;366–538. Sengupta R. Why Dutee Chand can change sports. *Live Mint* [Internet]. 2014 Nov 22 [cited 2014 Nov 25]; Available from: <http://www.livemint.com/Leisure/9P3jbOG2G0ppTVB7Xvwj0K/Why-Dutee-Chand-can-change-sports.html>

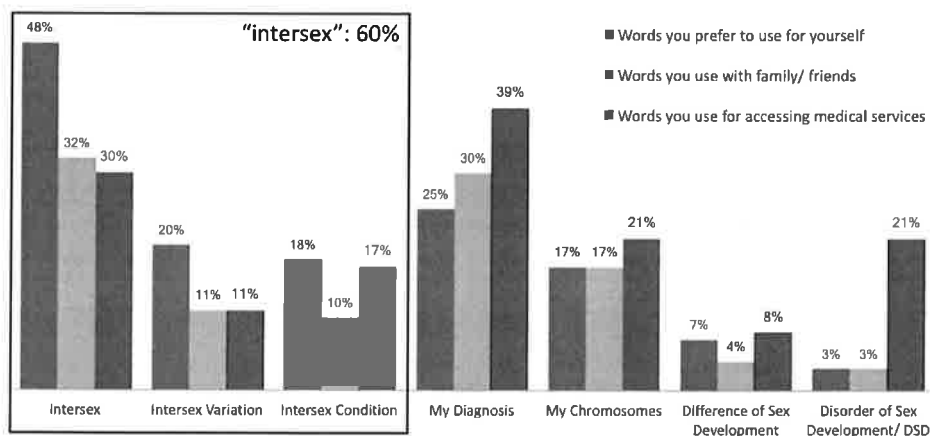
Sexual orientations



The rates of asexuality are particularly notable, and may reflect issues relating to body shaming and/or the impacts of medical interventions on capacity for intimacy. In this regard, it is notable that medical interventions are designed to address social stigma and, in part, the impact of stigma on access to (heterosexual) intimate relationships.¹²

Overall, these data on sexual orientation and gender identities shows that intersex is a distinct intersectional issue, intersecting with sexual orientation and gender identity, but with distinct differences unique to people born with intersex variations.

Sex characteristics



Note: multiple choices possible

¹² Cabral M, Carpenter M, editors. Intersex Issues in the International Classification of Diseases: a revision. 2014 [cited 2015 Oct 25]. Available from: <http://intersexday.org/wp-content/uploads/2015/10/intersex-issues-in-the-international-classification-of-diseases-cabral-carpen-ter-2014.pdf>

Gillam LH, Hewitt JK, Warne GL. Ethical Principles for the Management of Infants with Disorders of Sex Development. Hormone Research in Paediatrics. 2010;74(6):412–8.

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Overall, 60% of respondents use words including the term intersex. 48% self-describe as intersex, as being intersex. This incidentally might be regarded as self-ascribed identity and it can be compared with 19% of respondents favouring non-binary or third sex classifications. A significant proportion of respondents describe as “having an intersex variation” or “having an intersex condition”. The use of diagnostic labels and sex chromosomes is also common.

As is the case for all stigmatised minority populations (for example, “men who have sex with men”, “disabled people”), language choices vary from person to person, and depending on where used. It is particularly notable that only 3% of respondents use the clinical term “disorders of sex development” to describe themselves, while 21% use that term when accessing medical services. This could be regarded as a perceived need to disorder ourselves to obtain appropriate medical care.

7. Intersex status

Australia introduced “intersex status” in federal anti-discrimination law in 2013. The definition reads:

intersex status means the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or*
- (b) a combination of female and male; or*
- (c) neither female nor male.¹³*

The Explanatory Memorandum to the amending Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 states that intersex status was not intended to create a third sex, recognising that some intersex people may not identify as either male or female (as, indeed, may some non-intersex people) but, by doing so, acknowledges that many intersex people *are* female or male:

15. The definition recognises that being intersex is a biological condition, not a gender identity. It does not require a person who is intersex to identify as either male or female in order to access protections under the SDA. The definition is not intended to create a third sex in any sense.¹⁴

In addition, the Explanatory Memorandum to the sets out two sections where freedom of religion is protected. Section 37 applies to all grounds in the SDA but, in relation to section 38 on educational institutions established for religious purposes, the Explanatory Memorandum states, on page 9:

¹³ ComLaw. Sex Discrimination Act 1984. Canberra.

¹⁴ House of Representatives. Explanatory memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Internet]. 2013 [cited 2014 Nov 8]. Available from: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r5026

The Bill will not extend the [religious] exemption to cover the new ground of intersex status. During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief.¹⁴

Recognition of the diversity of intersex people was and remains important, however, the meaning of "intersex status" is often imputed to mean a fact about legal sex classifications or gender identity that is not supported by either the legal definition of the ground, or the diverse lived reality of intersex lives.

Inclusion of "intersex status" and its definition was a matter of what was possible at the time, amid fears that a biological framing of intersex would be included within a definition of gender identity, accompanied by an authenticity requirement conflicting with a need for protection on grounds of perception (already the case in some jurisdictions).¹⁵ No example definition of an alternative like "sex characteristics" was available to a federal government readying itself for an election campaign.¹⁶ Intersex status:

- Is not universal, in that not everyone has an intersex status; this is a characteristic shared with disability status, pregnancy status, trades union membership.
- Has no clear, unambiguous relationship to international law.
- Because of widespread public misconceptions, does not obviously relate to physical sex characteristics.
- For the same reasons, it is often incorrectly imputed or presumed to be (reduced to) an identity classification, or a sex classification.
- May not be used by people with intersex traits who understand themselves using different terms.
- Ensuring that people are protected on grounds of perceived intersex status requires that the definition be generalised in ways that make the definition imprecise (this also means that a current *Transgender Persons (Protection of Rights) Bill* in India uses substantively the same definition purportedly to protect transgender people from discrimination).¹⁷
- Has unfortunately been defined based on a model of deficit, primarily about what we lack and are not.

¹⁵ Such as the Equal Opportunities Act 2010 (Victoria).

¹⁶ Carpenter M, Organisation Intersex International Australia. Submission on the proposed federal Human Rights and Anti-Discrimination Bill [Internet]. Sydney: Organisation Intersex International Australia; 2012 Dec [cited 2013 Aug 31]. Available from: <http://oii.org.au/21433/submission-human-rights-anti-discrimination/>

¹⁷ Asia & The Pacific Policy Society. India's new transgender rights bill. 2016 Sep 23 [cited 2017 Feb 11]. Available from: <https://www.policyforum.net/indias-new-transgender-rights-bill/>

- Has been orphaned by international developments, notably the widespread adoption of a ground of 'sex characteristics'.

As a result of these concerns, and because of consensus within the intersex community in Australia and developments in international human rights law, OII Australia recommends protection on grounds of "sex characteristics" and not on grounds of "intersex status".

8. Sex characteristics

The Darlington Statement is a joint consensus statement signed in March 2017 by Australian and Aotearoa/New Zealand intersex organisations and independent advocates.

In line with the Darlington Statement, OII Australia recommends inclusion of intersex people in anti-discrimination law via the ground of "sex characteristics" and not a ground of "intersex status". The Darlington Statement recognises:

*3. The **diversity of our sex characteristics** and bodies, our identities, sexes, genders, and lived experiences. We also acknowledge **intersectionalities** with other populations, including same-sex attracted people, trans and gender diverse people, people with disabilities, women, men, and Indigenous - Aboriginal and Torres Strait Islander, Tangata Whenua - and racialised, migrant and refugee populations.*

*4. That the word 'intersex', and the intersex human rights movement, **belong equally to all people born with variations of sex characteristics**, irrespective of our gender identities, genders, legal sex classifications and sexual orientations.¹⁸*

In relation to protection from discrimination, the Statement calls:

*9. We call for effective **legislative protection** from discrimination and harmful practices on grounds of **sex characteristics**.*

The ground of "sex characteristics" was first enacted in law in Malta in 2015. Maltese law defines "sex characteristics" as:

"sex characteristics" refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and

¹⁸ Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Black E, Bond K, Briffa T, et al. Darlington Statement [Internet]. Sydney, NSW; 2017 Mar [cited 2017 Mar 10]. Available from: <https://oii.org.au/darlington-statement/>

*hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.*¹⁹

The Maltese law represents international best practice and has thus been widely adopted by international human rights institutions and other bodies. In our region, the Asia Pacific Forum of National Human Rights Institutions defined “sex characteristics” in 2016 as:

*A person’s physical characteristics relating to sex, including genitalia, chromosomes or hormones and also secondary sex characteristics that emerge at puberty.*⁹

‘Sex characteristics’ has also been adopted by the European Union Fundamental Rights Agency,²⁰ and the Council of Europe.²¹ The United Nations Office of the High Commissioner for Human Rights,² and the High Commissioner for Human Rights,²² have also used the term.

In November 2017, the Yogyakarta Principles on the application of international human rights law to sexual orientation and gender identity were updated with a Supplement on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics. A definition of “sex characteristics” is provided by that Yogyakarta Principles Supplement:

*each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty*¹

We expect this definition to be widely adopted in international, national and state law, in the same way that the 2007 Principles led to the widespread adoption of consistent definitions of “sexual orientation” and “gender identity”.²³

¹⁹ Malta. Gender Identity, Gender Expression and Sex Characteristics Act: Final version [Internet]. 2015 [cited 2015 Apr 15]. Available

from: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1>

²⁰ European Union Agency for Fundamental Rights. The fundamental rights situation of intersex people [Internet]. Vienna; 2015 [cited 2015 May 12]. Available from:

<http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>

European Union Agency for Fundamental Rights. Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015 [Internet]. 2015 Dec [cited 2015 Dec 14]. Available from:

<http://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015>

²¹ Council of Europe, Commissioner for Human Rights. Human rights and intersex people, Issue Paper [Internet]. 2015 Apr [cited 2015 May 12]. Available from:

[https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish&Ver=original](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish&Ver=original)

²² United Nations High Commissioner for Human Rights. Opening remarks by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights at the Expert meeting on ending human rights violations against intersex persons [Internet]. 2015 [cited 2015 Sep 16]. Available from:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>

²³ O’Flaherty M. The Yogyakarta Principles at Ten. *Nordic Journal of Human Rights*. 2015 Oct 2;33(4):280–98.

We commend this definition to the Northern Territory government and we hope that, in due course, other Australian jurisdictions will update their legislation accordingly, in line with this emerging international best practice.

Ettelbrick PL, Trabucco Zerán A. The impact of the Yogyakarta Principles on the International Human Rights Law Development, A Study of November 2007 – June 2010 [Internet]. 2016 [cited 2017 Sep 7]. Available from: http://www.ypinaction.org/wp/wp-content/uploads/2016/10/Yogyakarta_Principles_Impact_Tracking_Report.pdf